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No. 80-1890

In the Supreme Court of the United States

OCTOBER TERM, 1980

NIKOLAAS "KALLIE" KNOETZE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether revocation of petitioner's visa deprived him of liberty or property without due process of law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 634 F. 2d 207. The opinion of the district court (Pet. App. 1b-25b) is reported at 472 F. Supp. 201.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1981. The petition for a writ of certiorari was filed on April 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The other respondents are the Department of State, the Secretary of the Department of State, the Immigration and Naturalization Service, the United States Marshal and his deputies in the Southern District of Florida, the Attorney General, and certain unnamed enforcement officers of the federal government (see Pet. App. 1b).

STATEMENT

1. Petitioner is a world-class boxer and former policeman from South Africa who was granted a non-immigrant visa in December 1978 by the United States Consul in Johannesburg (Pet. App. 2b). Although petitioner had been convicted in South Africa for committing a crime involving moral turpitude—a circumstance that renders an alien ineligible for a visa under 8 U.S.C. 1182(a)(9) (Pet. App. 2a-3a & n.1)—the Consul issued the visa because he erroneously believed that the charge against petitioner had involved a petty offense.[2]

The issuance of the visa attracted the interest of various individuals and organizations in South Africa and the United States because of petitioner's alleged involvement in the shooting of a black youth in South Africa (Pet. App. 7b-9b). Although petitioner was ultimately absolved of guilt in that incident (*id.* at 8b), the investigation by the Department of State disclosed that petitioner's visa had been issued erroneously. The Secretary of State determined that, because petitioner's criminal conduct corresponded to the federal offense of influencing a witness in violation of 18 U.S.C. 1503, a felony involving moral turpitude, he did not qualify for the petty offense exception prescribed in 8 U.S.C. 1182(a)(9) and was not entitled to receive a visa (Pet. App. 3a, 2b). Without prior notice to petitioner, the Secretary revoked his non-immigrant visa (*id.* at 2b).

2. Although petitioner did not receive formal notice of the Secretary's proposed action, he received actual notice through the news media (Pet. App. 3b). He then filed suit in

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[2]Petitioner pleaded guilty to the charge that he attempted "to obstruct or impede the process of justice" while serving as a policeman (Pet. App. 2b). The indictment alleged that petitioner made several false statements while serving as a policeman in an attempt to persuade citizens of his country to drop assault charges against a fellow police officer (*id.* at 3a).

the United States District Court for the Southern District of Florida, seeking an injunction barring the Secretary from revoking his visa (*ibid.*). The district court granted a preliminary injunction in petitioner's favor and permitted him to take discovery.[3] While the preliminary injunction was in effect, petitioner participated in a prize fight in this country (*id.* at 3a). After receiving extensive testimony relating to the Secretary's decision to revoke petitioner's visa, and after exploring the legal and factual basis for that decision, the district court denied a permanent injunction and sustained the Secretary's action. The district court found that there was sufficient evidence to support the Secretary's determination, that the Secretary had not abused his discretion, and that his decision had not impermissibly been influenced by political pressure (*id.* at 18b, 24b).

The court of appeals affirmed (Pet. App. 1a-10a). The court concluded that the Secretary has power to revoke the visa of an alien already in the United States (Pet. App. 6a-7a) and that the Secretary did not abuse his discretion by revoking the visa in this case (*id.* at 7a-9a). The court of appeals also noted that revocation of an entry visa does not automatically lead to deportation and that, before petitioner could be deported from this country, he would be entitled to invoke all of the procedural safeguards that surround a deportation proceeding (*id.* at 9a-10a).

ARGUMENT

Petitioner contends (Pet. 4-7) that he was denied due process of law because the Secretary did not give him a hearing before revoking his visa. He contends (*id.* at 5) that "the Secretary of State has done everything from the beginning to prevent the petitioner from having a hearing where

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[3]As the district court noted, "[t]he Government was very accommodating to plaintiff and made several individuals available" for depositions (Pet. App. 19b, 4b).

the fundamental essential elements of fairness would be present."

1. Petitioner's claim that he was denied a fair hearing is insubstantial. It is undisputed that, prior to the Secretary's decision to revoke petitioner's visa, petitioner learned of the Secretary's proposed action and filed suit in the district court to obtain injunctive relief. The district court granted a preliminary injunction in his favor, during which he engaged in extensive discovery relating to the revocation decision. The district court then received evidence bearing on the merits of the Secretary's decision (Pet. App. 4b) and fully evaluated that decision before affirming it (*id.* at 10b-24b).[4] The court of appeals also reviewed the Secretary's decision on the merits, applying the standards of the Administrative Procedure Act, 5 U.S.C. 706(2) (Pet. App. 4a-10a).[5] In these circumstances, there is no substance to petitioner's claim that he was denied a fair opportunity to challenge the legality of the Secretary's revocation of his visa. Even if he was entitled to a hearing before losing his visa, the extensive hearing procedures provided in the district court afforded all the process that was due.[6]

2. In any event, the court of appeals correctly concluded that the Secretary was not required to afford petitioner a hearing before revoking his visa. Petitioner is unable to

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[4]The district court reviewed the Secretary's discretionary decision pursuant to the standards of the Administrative Procedure Act, rather than rendering a de novo determination.

[5]Moreover, as the court of appeals pointed out, petitioner could not be deported from this country without receiving still further procedural protections, including "reasonable notice, a fair hearing, opportunity for cross-examination, and legal representation" (Pet. App. 9a).

[6]The Secretary's decision to revoke petitioner's visa was based solely on his legal determination that petitioner was statutorily ineligible for a visa under 8 U.S.C. 1182(a)(9). Petitioner has not challenged that conclusion in this Court. Cf. *Codd* v. *Velger*, 429 U.S. 624, 627 (1977).

point to any federal statute or regulation that supports a claim of entitlement to a visa. Even if an applicant is fully eligible for a visa—which petitioner is not—the applicant has no right to or reasonable expectation of receiving a visa. Grant of a visa to a visitor such as petitioner is entirely discretionary (8 U.S.C. 1201(a)). Moreover, the Act explicitly states that "[n]othing in this chapter shall be construed to entitle any alien, to whom a visa * * * has been issued, to enter the United States, if, upon arrival * * * he is found to be inadmissible * * *" (8 U.S.C. 1201(h)). Finally, the Act provides, without limitation, that, after "issuance of a visa or other documentation to any alien, the consular officer or the Secretary of State *may at any time, in his discretion,* revoke such a visa * * *" (8 U.S.C. 1201(i); emphasis added). Thus, both the grant and subsequent revocation of petitioner's visa were wholly discretionary in nature. And because the discretionary power vested in the Secretary is not confined by statutory standards, it may be exercised without affording a hearing.[7] See *Greenholtz* v. *Nebraska Penal Inmates,* 442 U.S. 1, 7 (1979); *Board of Pardons* v. *Dumschat,* No. 79-1997 (June 17, 1981), slip op. 7-8.[8]

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[7]The Secretary's regulations (22 C.F.R. 41.134) permit a hearing before revocation of a visa, but they do not require such a hearing. A hearing will be held under the regulations only "if practicable." See *In re P* * * * *N* * * *,* 8 I. & N. Dec. 456, 458-459 (1959). Furthermore, the regulations apply solely to revocations by overseas consuls, not revocations by the Secretary. *Ibid.*

[8]Petitioner's reliance on *Agee* v. *Muskie,* 629 F. 2d 80 (D.C. Cir. 1980), rev'd, No. 80-83 (June 29, 1981), is completely misplaced. In that case, this Court held that a citizen's passport could be revoked based on a statement of reasons and an opportunity for a post-revocation hearing—while reserving the issue whether even those procedures were constitutionally required. See slip op. 28 & n.62. In this case, petitioner, an alien, received the benefit of a post-revocation hearing through the proceedings in the district court. Moreover, as noted above, this was more process than is due under a statutory scheme that vests the Secretary with unfettered discretion to grant or deny visas to foreign

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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visitors. *United States ex rel. Strachey* v. *Reimer*, 101 F. 2d 267 (2d Cir. 1939), is also irrelevant here. Under the statute in force at the time of that decision, neither the Secretary nor overseas consuls had authority to revoke a visa once issued. 101 F. 2d at 269. Under current law, the Secretary may revoke a visa "at any time, in his discretion." 8 U.S.C. 1201(i). Petitioner was on notice of this provision when he applied for a non-immigrant visa. Cf. *Dames & Moore* v. *Regan*, No. 80-2078 (July 2, 1981), slip op. 15-16 n.6 (claimants had no property interest in attachments obtained pursuant to licenses that were expressly made revocable at any time).

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